



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: The Department of the Navy--Request for  
Reconsideration  
File: B-225570.2  
Date: July 20, 1987

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### DIGEST

1. Award of a franchise contract for cable television services concerns procurement of property or services by federal agency and thus is subject to General Accounting Office's (GAO) bid protest jurisdiction.
2. Prior decision in which GAO sustained protest that agency erroneously disqualified protester's proposal is affirmed where, upon request for reconsideration, agency presents no basis for reversing conclusion that protester's proposal met all of the RFP's requirements.

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### DECISION

The Department of the Navy requests reconsideration of our decision in Americable International, Inc., B-225570, May 5, 1987, 87-1 C.P.D. \_\_\_\_\_. In that decision, we sustained a protest filed by Americable International, Inc., concerning the Navy's award of a cable television franchise agreement to Antilles Trading Company pursuant to request for proposals (RFP) No. N62470-86-B-7931. The Navy argues that our evaluation of Americable's proposal was incorrect and our legal analysis in error. We affirm our prior decision.

The RFP was issued by the United States Naval Base, Guantanamo Bay, Cuba, seeking proposals to provide cable television services for the naval base.

The RFP required proposals to offer both a "basic service"<sup>1/</sup> and a "premium service"<sup>2/</sup> and stipulated that "premium

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<sup>1/</sup> Schedule D, paragraph 1(a) of the RFP required the "basic service" to consist of a minimum of 10 channels, 8 of which included: MTV, ESPN, WTBS, NICKELODEON, USA, ABC affiliate, CBS affiliate, and NBC affiliate.

<sup>2/</sup> Schedule D, paragraph 1(b) of the RFP required "premium service" to consist of at least two of the following services: Home Box Office, Showtime, The Movie Channel, the Disney Channel, and Cinemax. 039522

service" must be available to subscribers without the necessity of purchasing "basic service." The RFP also required the successful offeror to provide free "basic service" to all ships and duty rooms.<sup>3/</sup> Proposals were submitted by five offerors including Americable and Antilles.

Upon review of the proposals, the Navy stated that it "found Americable's proposal nonresponsive and excluded the company from further consideration." This disqualification was based on the Navy's conclusion that Americable's proposal "failed to provide free basic cable service to the ships and duty rooms and also failed to provide customers the option of subscribing to premium channels without purchasing the basic service."

In response to the initial protest, the Navy chose not to present any arguments concerning the merits of the protest, opting instead to provide our Office with only the Evaluation Committee Meeting Minutes and copies of Americable's and Antilles' proposals. Rather than address the merits of the protester's case, the Navy argued that our Office was without jurisdiction to resolve this matter.

In our prior decision we first rejected the Navy's arguments concerning jurisdiction. We then reviewed the propriety of Americable's disqualification. We concluded that Americable's proposal, in fact, offered to provide the requirements of the RFP, and we found no basis for its disqualification. Specifically, we found that Americable offered to provide the ships and duty rooms with precisely the service which the RFP defined as "basic service" and also that Americable offered subscribers the option of purchasing "premium service" without the necessity of subscribing to "basic service." We recommended that the Navy reevaluate the proposal submitted by Americable and award the franchise agreement consistent with the RFP award criteria.

We note initially that the protester contends that the Navy's request for reconsideration, which we received on

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<sup>3/</sup> Paragraph 56 under the RFP section "General Requirements" stated:

"As consideration for use of the government owned cable system, the government desires free basic cable service (basic tier) for all duty rooms (approximately 27) aboard the Naval Base and for visiting ships . . . ."

May 21, is untimely. We disagree. Our Bid Protest Regulations require that a request for reconsideration shall be filed not later than 10 working days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.12 (1986). While our decision was issued on May 5, we allow a reasonable time, 1 calendar week, for receipt by mail of the decision by interested parties, absent evidence of earlier actual receipt. See Adrian Supply Co.--Reconsideration, B-225472.3, Mar. 23, 1987, 87-1 C.P.D. ¶ 328. Thus, allowing time for receipt by mail, the Navy's request for reconsideration filed on May 21 is timely.

In its request for reconsideration, the Navy again argues that we lack jurisdiction to consider the award of a cable television franchise. The Navy argues that the "agreement" is not a contract, no contracting officer is involved, there can be no violation of a procurement statute and/or regulation because the procurement laws and regulations do not apply to the cable "agreement," and our bid protest jurisdiction does not extend to anything other than appropriated fund procurements.

Essentially the Navy continues to disagree with our conclusion that our bid protest jurisdiction extends to this type of procurement, and the Navy is merely restating arguments it has previously made. Our Office has repeatedly rejected the position which the Navy takes on this issue. See, e.g., Cable Antenna Systems, 65 Comp. Gen. 313 (1986), 86-1 C.P.D. ¶ 168; T.V. Travel, Inc.--Request for Reconsideration, 65 Comp. Gen. 109 (1985), 85-2 C.P.D. ¶ 640. We thus affirm this aspect of our prior decision.

Regarding the merits, the Navy asserts that it properly disqualified Americable's offer because Americable's proposal did not provide customers the option of purchasing "premium service" without subscribing to "basic service." Again, our review of Americable's proposal showed that Americable met this requirement.

In our prior decision, we stated that Americable's proposal met the "premium service" requirement under the section of its proposal headed "Tier I-Basic Cable-Free." Under this heading, the proposal listed a few channels that all base residents would receive without paying any fee whatsoever. Under this "Tier I" heading Americable also offered three optional channels--The Movie Channel, Home Box Office, and Cinemax--which could be purchased for a monthly fee. The offering of these three channels met the requirement for "premium service" as defined in schedule D, paragraph 1(b) of the RFP (see footnote 2 above). The free "Tier I" service was separate and apart from yet another portion of

Americable's proposal which responded to the RFP's requirements for "basic service" and was offered to customers for \$4.95 per month. Since we concluded that the three premium channels were offered in conjunction with the free "Tier I" service, we found that Americable's proposal did, in fact, meet the RFP's requirement of offering "premium service" without the necessity of purchasing "basic service."

In its request for reconsideration the Navy refers to language in Americable's proposal to support its position that Americable was nonresponsive to the RFP's requirement for "premium service." The Navy states that:

". . . Americable specifically stated in a footnote under the 'Tier I' heading that The Movie Channel would not be available without the necessity of subscribing to the basic service."  
(Emphasis added by Navy.)

However, the footnote to which the Navy refers actually states:

"The Movie Channel (optional) will be available without the necessity of subscribing to ['basic service'] or paying a refundable converter deposit." (Emphasis added by our Office.)

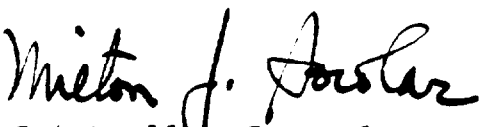
Thus, the Navy's statement of Americable's proposal is precisely the opposite of what Americable's proposal, in fact, stated. Other than this misquoted statement, the Navy offers no new evidence indicating that the "premium service" offered by Americable required customers to pay for, or was in any way linked with, the "basic service" it offered.

The Navy also maintains that it properly disqualified Americable's proposal on the basis that Americable did not offer the proper "basic service" when it responded to the RFP requirement for offerors to provide free "basic service" to the Navy's ships and duty rooms. We disagree.

The Navy's requirements for "basic service" were defined in schedule D, paragraph 1(a) of the RFP, and required a minimum of 10 channels, 8 of which were designated in the RFP. In its request for reconsideration, the Navy expressly acknowledges that "what Americable offered, in fact, was a special channel arrangement for ships and duty rooms which happened to match the minimum requirements outlined in schedule D of the [RFP]." The Navy argues, however, that it intended that offerors offer more channels than the minimum requirements identified in schedule D and that the awardee, in fact, offered several more channels than Americable offered.

In our prior decision, we concluded that Americable's proposal was acceptable, because we found it met the free service requirement. The Navy effectively acknowledges this in its reconsideration request. Based on our conclusion that Americable submitted an acceptable proposal, we recommended that the Navy reevaluate Americable's proposal and upon reevaluation, make an award consistent with the RFP criteria.

The Navy now appears to be arguing that it awarded to Antilles because its offer was superior to Americable, that is, it offered more channels than the protester. The RFP award criteria provided that award would be made, as a general rule, to the franchise which submitted the lowest priced technically acceptable offer "for the broadest and best quality service." The RFP also provided that award could be made to other than the low offeror, if justified by certain enumerated considerations. As indicated above, the RFP did not require an award to Americable as the low offeror. If, as the Navy suggests, award to Antilles can be justified under the award criteria, the Navy is not required to disturb the award after review of both offers if it is determined that the award was in accordance with our decision. Therefore, our prior decision and recommendation is affirmed.

*for*   
Comptroller General  
of the United States